IN THE SUPREME COURT FOR THE STATE OF MONTANA
CASE NO. DA 10-0051

DEBBIE PATCH, as Personal Representative of the Estate of BRANDON PATCH, Deceased, and DEBBIE AND DUANE PATCH,

Plaintiffs and Appellees,

v.

HILLERICH & BRADSBY CO., d/b/a LOUISVILLE SLUGGER

Defendant and Appellant

On Appeal from the District Court for the First Judicial District
(The Honorable Kathy Seeley)

APPELLANT HILLERICH & BRADSBY CO., d/b/a LOUISVILLE SLUGGER'S OPENING BRIEF

APPEARANCES:
W. Scott Mitchell
Robert L. Sterup
Kyle A. Gray
Holland & Hart LLP
Suite 1500, 401 North 31st Street
P.O. Box 639
Billings, MT 59101
Telephone: 406-252-2166
Facsimile: 406-252-1669
smitchell@hollandhart.com
rsterup@hollandhart.com
kgray@hollandhart.com

ATTORNEYS FOR APPELLANT

Curt Drake
Michael A. Kauffman
Drake Law Firm, P.C.
111 North Last Chance Gulch
Suite 3J, Arcade Building
P.O. Box 1181
Helena, MT 59624-1181
curt@drakemt.com

Joe E. White, Jr.
White & Weddle, P.C.
5532 North Western
Oklahoma City, OK 73118
joewhite@coxinet.net

ATTORNEYS FOR APPELLEES

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I. STATEMENT OF THE ISSUES

1. Is Hillerich & Bradsby ("H&B"), the maker of Louisville Slugger baseball bats, entitled to judgment as a matter of law because:

a) the court wrongly denied summary judgment that as bystander/non-users of the bat, Plaintiffs did not have a legally viable products liability failure to warn claim?

b) the court wrongly denied H&B's Rule 50(b) motion by applying, post-trial, a "read-and-heed" inference contrary to statute and controlling precedent?

2. Alternatively, is H&B entitled to a new trial because:

a) the court wrongly dismissed H&B's statutory assumption of risk defense?

b) the court wrongly instructed the jury under a "bystander contemplation test," and wrongly refused H&B's jury instructions on the elements of causation for products liability failure to warn?

c) there is insufficient evidence in the record of causation to justify the failure to warn verdict, which is contrary to §27-1-719 and §26-1-502, MCA?

3. Is new trial limited to a liability-only retrial of products liability failure to warn because Plaintiffs did not cross appeal?

II. STATEMENT OF THE CASE

A. Nature Of The Case.

While pitching in an American Legion game, 18-year old Brandon Patch was struck in the head by a baseball hit with a metal baseball bat used by a player for the other team. Tragically, Brandon died from a subdural hematoma. Plaintiffs (Brandon's Estate and parents) sued H&B on products liability claims under §27-1-719, MCA, for survivorship and wrongful death damages.

B. Procedural Disposition Below.

Summary judgment for H&B was denied on Plaintiffs' defective design and failure to warn products liability claims, but granted on Plaintiffs' defective manufacturing claim. The court granted Plaintiffs' motion in limine, dismissing H&B's assumption of risk defense. At trial, the court denied H&B's Rule 50(a) motions. On October 28, 2009, the jury returned a verdict for H&B on the defective design claim, but for Plaintiffs on failure to warn, awarding survivorship and wrongful death damages of $850,000. On January 8, 2010, the court denied H&B's Rule 50(b) motion. On February 4, 2010, H&B timely filed this appeal. (App.62,82,88,147-149,199,211,233,240).[1]

[1] Record cites – (App.__) – are to pages of H&B's separately-bound Appendix.

III. STATEMENT OF FACTS

Dave Thennis is the long-time coach of the Helena Senators American Legion baseball team. Before the 2003 Legion season, he purchased team bats manufactured by several companies – including Easton, DeMarini and Louisville Slugger – which were on closeout. Legion Ball is played by high school and college-age players 15 to 19 years old. As is true for Little League, High School and NCAA college baseball, Legion Ball is played with metal (*aka* aluminum) bats. Coach Thennis chose his team's bats by price, not brand, and expected his players would use the bats for hits, including home runs. (App.107,110,149-150,152,158,164-67,169).

Coach Thennis bought metal bats because those are the kind his players use, like all other Legion players. He purchased "minus three" bats, (meaning the bats had a unit-of-three difference between length and weight, *e.g.*, 32-inches long and 29-ounces), because they were the type allowed under American Legion rules in effect in 2003. One 32/29 bat he purchased for use by the Senators was H&B's CB-13 Louisville Slugger model. (App.112-113,141,143,150,158,13-14).

H&B, a family-owned company, has been making baseball bats since 1884, when Bud Hillerich turned the first "Louisville Slugger" on a lathe in his father's Kentucky wood shop. Louisville Sluggers have been used by storied players like Babe Ruth and Ted Williams. As Bud Hillerich's great-grandson testified at trial,

the family's company continues to make bats and loves the game of baseball. (App.146-147).

Like H&B, Brandon Patch loved baseball. When he stepped on the mound July 25, 2003, Brandon was soon to turn 19-years old, and was an experienced, accomplished player with the Miles City Mavericks, a team in the same conference as the Senators. Brandon was in his last year of Legion ball, and had been playing baseball since he was five. This would be his last game for the Mavericks because next year he would be playing college baseball on scholarship. As Brandon's mother explained at trial, Brandon "loved baseball. Just loved baseball. He did like golf, because he like to goof off and play golf. But he just loved baseball." (App.120,123,126,128,136,144,145,162).

Baseball is often called "America's Game." It is a sport that pre-dates H&B's 125-year bat-making history. And like any sport, playing it entails some risk. As common sports go in the United States, baseball is very safe – safer than football, wrestling, soccer, hockey and gymnastics. Batted-ball injuries are a small subset of all baseball injuries, with nearly half of those chest or "commodo cordis" heart-stoppage injuries unrelated to ball speed. More injuries occur from pitched than batted balls. A 16-year long comprehensive NCAA study showed the chance of a pitcher being seriously injured by a batted ball is about two-one-hundredths of one-percent per game played. (App.146,162-163,164,165-166,168).

This safety record is true whether wood, or the newer metal bats introduced in the 1970s, are used. Indeed, some studies show the small amount of catastrophic injuries that do occur, are slightly more frequent with wood than metal bats. Because they do not break, carry less weight in the barrel and have larger "sweet spots," metal bats are more durable and easier to control than wood bats. Although less-experienced players can hit balls a little faster with metal bats, an experienced batter with good batting technique can hit balls harder and faster with a wood bat's more solid collision capabilities. Shortly after Brandon's death, a high school pitcher in Utah died after being struck by a wood-batted ball. Injury rates in the wood and metal eras have remained stable over the last twenty to thirty years. (App.135,156-157,159,160,165-166,177,178,181,185,194).

While not knowing the precise safety statistics, Brandon knew he was at some risk every pitch he threw, to be hit and injured by a ball batted back at him, but continued to play the game he loved. Brandon had been hit with batted balls before, and his parents expected he would get hit again, that his arm could be broken or some other injury might happen. Debbie Patch testified: "you always think, you know, of them getting him in the arm," and Duane Patch testified he knew there was "risk of [Brandon] getting hit by a bat – the ball and perhaps getting injured. Hit in the leg, in the arm," whenever Brandon played. (App.120-121,126).

Like the other Legion players and coaches, Brandon would have known metal bats hit baseballs very hard, hard enough to reach home run velocity. Players had hit home runs off Brandon's pitching. Like the other players and coaches, Brandon would have never seen a warning on a bat – there were none on any of them. As a Mavericks' pitcher, Brandon would not have used the Senators' bats, and would not have known what particular bat was being used by any opposing-team hitter, except that it was metal. (App.111,118,126,143,150,151,87).

Quinn LeSage also loved baseball. He played for the Senators and was a very good hitter. He would be MVP of the State Legion Tournament, and the next year would play college baseball. For any at-bat, Quinn could have used a certified bat he bought, or any of the team bats Coach Thennis purchased for use by the Senators. Whatever bat he chose, like all Legion players, Quinn would have used a metal bat, as expected by players, coaches and spectators. (App.112-113,141,149-150,187,13-14).

Quinn came to the plate on July 25, 2003, holding the CB-13. Brandon was pitching from about 60' 6" away, and would not have known which of the Senators' bats Quinn held. Brandon's parents were in the stands, even farther away from Quinn and his chosen bat. Quinn swung and connected solidly with the ball Brandon pitched to him, and hit a line drive up the middle. Brandon was at the end of his follow-through, balancing on a mound which had been maintained by

the City of Helena at nine-inches above regulation height. The baseball hit Brandon in the head and ricocheted out behind first base. If the mound had been at regulation height the ball would have missed Brandon's head by eight inches. (App.117,136,137,150-151,153,173,193).

The ball Quinn hit was a solid line drive. Some spectators were unable to follow its path. Others, like the field umpire, followed its flight. The umpire and Coach Thennis testified it was a well-hit ball, but nothing unusual, a "typical line drive." Coach Thennis testified he had seen balls hit as hard or harder. Expert testimony established the ball would probably not have been a home run. All home run balls, whether off wood or metal bats, must exceed 100 MPH; Legion-age batters can hit balls exceeding 100 MPH with wood or metal bats. Home runs are not uncommon in Legion games, including at Helena Kindrick field. At most the ball Quinn hit traveled at 101.7 MPH leaving the bat, and its average speed was 95 MPH in the distance between the plate and when it hit Brandon. (App.108,142,151,171-172,173,174,13-14).

At first Brandon seemed fine, and said "I'm okay," but then he convulsed and an ambulance was called. Brandon was later flown by helicopter to Great Falls where he died shortly after arriving at the hospital. (App.105,137,138,153).

Saddened by Brandon's death, the Montana Legion teams played their 2003 regular season and state tournament games, all with metal bats. The Patches

focused on the bat, placing blame there for the tragic, incomprehensible loss of Brandon. The Mavericks played a few years with wood bats, forfeiting some games because all other Montana Legion teams continued to play with metal bats pursuant to Legion rules. Later, the Mavericks switched back to metal bats, and continue to use them in Legion games. (App.118,126,139-140,151,158).

In 2006, Brandon's parents filed suit against H&B. They claimed the CB-13 was defectively designed or manufactured, and lacked warning language. They did not sue the American Legion, the manufacturer of the product that actually struck Brandon (the baseball), nor the City for the non-regulation mound. (App.1).

Plaintiffs did not produce experts on bat safety, bat performance, wood/metal injury comparisons, or epidemiology (the science of injury). All such evidence on motions and at trial was presented by H&B. While Plaintiffs offered an expert to calculate the ball speed and time between the hit and impact with Brandon (.376 seconds, bat exit-speed 101.7 MPH), they provided no expert on reaction times. (App.114,115-116,45).

The scientific evidence established the CB-13 is not special. As compared to other Legion-usable bats, it was a "cool" bat, in the lower third as to bat speed among the type of certified metal bats Coach Thennis purchased. The CB-13 could hit a ball about 2 MPH faster than a comparable wood bat, whereas the "hotter" certified bats could hit a ball 4 to 6 MPH faster. The differential in the

speed of the ball that hit Brandon, if hit with a wood bat instead of the CB-13, was eight-thousands (.008) of a second, a scientifically insignificant difference according to the experts at trial. Plaintiffs offered no evidence that tiny speed differential would (or could) have given Brandon sufficient time to duck or block the ball. Plaintiffs offered no evidence if the CB-13 had a warning, that Quinn would have used a wood bat that evening. The evidence established that in all 2003 Legion games, players used metal bats only. (App.110,112-113,140-141,150,175-176,181-182,13).

Plaintiffs offered no evidence that if the CB-13 did have a warning, Quinn would have selected a different bat on July 25. It was uncontroverted that if Quinn had not used the CB-13, he would have used another metal bat. Plaintiffs offered no evidence any other metal bat Quinn might have used that evening would have resulted in a batted-ball speed low enough to alter the outcome of the accident, and conceded this fact in closing. (App.149-150,182,198).

All metal bats available in Legion ball in 2003 were tested for compliance with NCAA-bat certification standards adopted by the Legion. The evidence established of the 61 certified bats (from all manufacturers) then available, 43 produced higher batted-ball speeds than the CB-13. Plaintiffs offered no evidence regarding what other bats were in the bat rack in the Senators' dugout on July 25. Plaintiffs offered no evidence to controvert expert testimony that all 2003 Legion-

approved metal bats (and all wood bats) were capable of hitting balls 100 MPH and greater, a common batted-ball speed. (App.173,179,183-184, 186,188).

Neither in their pleadings nor their trial evidence did Plaintiffs ever explain what the warning was they insisted the CB-13 should carry. Nor were Plaintiffs consistent in who they said should be warned, arguing alternatively that Brandon, his parents, Quinn, or his parents, should have been warned about something unspecified regarding either all metal bats, or just the CB-13. (App.33,55-56,191,192).

At trial, Plaintiffs did not call Quinn as a witness, and the evidence given about him was that after Brandon died from the ball he hit, Quinn continued to play with metal bats in Legion and college ball. Plaintiffs did not question any of the Legion players regarding how they would have reacted to a bat warning, and did not question Coach Thennis whether he would have chosen differently when purchasing bats in 2003 if the CB-13 had carried a warning. Coach Thennis testified the Senators continued to use metal bats. (App.106,141-143,149-154-155).

Plaintiffs offered no evidence regarding Brandon's safety habits – *e.g.*, that he always wore seat belts, did not use tobacco, etc. The sole evidence about Brandon's rule-following propensities was he obeyed his parents' curfew rules; other testimony was that Brandon hunted, played football (the most dangerous

common sport), and continued to play baseball even after being hit. No questions were asked of Brandon's parents regarding how they would have responded to a warning on the CB-13 on July 25, assuming they somehow became aware it had one. In fact, no evidence was proffered that Brandon or his parents had any knowledge of, or experience with, the CB-13 before Quinn used it that sad day. (App.119,132,133-135).

IV. STANDARD OF REVIEW

Review for denial of summary judgment or a Rule 50(b) motion is *de novo*. *Schuff v. Jackson ("Schuff II")*, 2008 MT 81, ¶14. Review of discretionary rulings is for abuse of discretion, unless the ruling involves a conclusion of law, for which review is plenary. *Lacock v. 4B's Restaurants, Inc.*, 277 Mont. 17, 20-21, 919 P.2d 371, 375 (1996); *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶¶17, 26.

V. SUMMARY OF ARGUMENT

This case is about nothing less than the future of baseball. A baseball bat is a simple, well-known product. It is designed for one thing, to hit a pitched baseball as hard as possible. It has no moving gears, no sharp edges, no toxic ingredients. It is used openly (and proudly) by millions of players every year to – they hope and try – hit baseballs (and softballs) hard. The jury was surely right to conclude the CB-13 was not defectively designed, and Plaintiffs' decision not to cross-appeal from that verdict is clear proof H&B's bat is not defective. However,

the case went astray from the start on the claim of failure to warn. The suggestion that such a simple product needs a warning about what it so obviously does, is suspect. The idea that the warning must somehow be issued to bystanders who never use the bat or even see it up close, is irrational and an improper foundation for a legal cause of action. Some claims should never go to a jury understandably sympathetic to a family tragedy. This is such a claim.

Judgment as a Matter of Law. Pre-trial, the court erroneously denied summary judgment because failure to warn a bystander is not a viable legal claim. Plaintiffs also failed to offer evidence of causation by affidavit or otherwise that non-Senator, non-user Brandon (or his parents) could have seen a warning on the Senators' CB-13 team bat in Quinn's hands and somehow altered the outcome.

Post-trial, the court wrongly denied H&B's Rule 50(b) motion. Plaintiffs offered no evidence regarding how non-user Brandon (or his parents) could have seen a warning on Quinn's bat at least 60-feet away, much less have read and heeded it in a manner to avoid the accident. There is no evidence that the user (Quinn) or the consumer (Coach Thennis), would have altered their conduct in the face of a warning. The court recognized this lack of evidence, but wrongly applied, post-trial, an illogical bystander "read-and-heed" inference for Brandon that is contrary to this Court's precedent and §26-1-502, MCA.

New Trial. Alternatively, a new liability trial is required on the failure to warn claim:

If bystander failure-to-warn is a viable claim, then H&B's assumption of risk defense was wrongly dismissed because it is for the jury to determine whether Plaintiffs unreasonably assumed the risk of injury.

The court wrongly instructed the jury under a "bystander contemplation" test unrecognized in law. The court wrongly refused H&B's instruction on the special failure to warn causation elements adopted by this Court, requiring proof a warning would have altered the product use or prompted precautions to avoid the injury.

There is insufficient evidence in the record to justify the failure to warn verdict. Plaintiffs never offered warning language, or evidence that a warning would – even could – have been read and heeded by a pitcher 60-feet away from another team's product. Even using an improper "read-and-heed" inference, Plaintiffs proffered no facts on which the inference could properly be based.

Finally, because Plaintiffs did not cross-appeal from the defective manufacturing summary judgment, from the jury's defective design verdict, or from the jury's award for their survivorship and wrongful death damages, those are all final and cannot be revisited on remand for new trial.

VI. ARGUMENT

A. H&B's Summary Judgment Motion was Wrongly Denied.

H&B moved for summary judgment on Plaintiffs' failure to warn claim, relying on §27-1-719, MCA; *Riley v. American Honda Motor Company*, 259 Mont. 128, 856 P.2d 196 (1993), *Wood v. Old Trapper Taxi*, 286 Mont. 18, 952 P.2d 1375 (1997), and Debbie Patch's deposition explaining Plaintiffs' failure to warn claim was that H&B should have warned Legion pitchers and their parents. (App.25-27,33-34). Section 27-1-719 limits products liability to injured users and consumers. The cases hold the failure to warn causation burden is met "by evidence that a warning would have altered the plaintiff's use of a product or prompted the plaintiff to take precautions to avoid the injury." *Wood* at 30, 1383, citing *Riley*.

For user/consumers, this is not a difficult summary judgment burden. *Wood* at 30, 1383 (summary judgment properly denied because user testified he would have used guy wires if warned); *Emery v. Federated Foods, Inc.*, 262 Mont. 83, 92-93, 863 P.2d 426, 432 (1993) (summary judgment properly denied because consumer testified she would not have purchased product if warned). Plaintiffs here offered no such evidence.

On summary judgment, H&B showed Plaintiffs' claim was legally invalid because Plaintiffs were not users or consumers of the CB-13, so a warning to them

could not have altered the batter's use of the product. (App.25-27). H&B established Plaintiffs were aware of the purported defect, *i.e.*, that metal bats hit balls hard and fast enough that a player is at risk of being hit by a batted ball before he has time to react. Brandon's father "agree[d] that being hit by a batted ball is one of the inherent risks of the game of baseball." (App.44).

Because Plaintiffs were not users or consumers of the bat, they were in no position to alter its use or purchase, even if somehow a warning had been given that they would have seen. Brandon's mother admitted the users – *i.e.*, the batters – would likely ignore a warning but argued parents should be warned:

> There was no warning on the bats whatsoever, no warnings whatsoever, the velocity, how hard they can hit, nothing. Maybe **the kids wouldn't look at it**, **but parents would.**

(App.33)(emphasis added).[2]

Parents are not "users" of bats, just as pitchers are not users of opposing-team bats. At the Legion level (played not by "kids," but youths and young adults), parents do not make product-purchasing decisions; so they are also not "consumers." Asked whether she ever "personally made a bat-purchasing decision," Debbie Patch answered:

> I didn't ever make a purchase on that. Like I said, when Brandon had one, it was when he was in Babe Ruth, that area. I

[2] Not surprisingly, Plaintiffs offered no authority H&B owed a duty to warn the parents of college-bound adults like Brandon and Quinn.

> don't even remember what brand it was. After that, we never purchased one, **they were always purchased by the team**.

(App.36)(emphasis added). Here, the CB-13 was not even purchased by Brandon's team, so Plaintiffs would have had no possible input regarding its purchase even if it did have a warning.

Thus, H&B established Plaintiffs failed to advance "a cognizable products liability 'warning' theory" in their claim that H&B should have warned Plaintiffs. (App.27). In their summary judgment response, Plaintiffs suggested Brandon was somehow the bat's "user," but cited no authority, relying solely on cases extending the protection of defective design and manufacturing claims (**not** failure to warn claims) to bystanders. (App.55-56).[3] Plaintiffs cited no authority establishing a duty for product manufacturers to warn non-user bystanders, much less to warn the non-user, non-consumer parents of an adult non-user bystander. Just saying it shows how illogical the theory is.[4]

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[3] Plaintiffs later admitted: "[i]t is patently obvious that Brandon Patch was not a 'user or consumer' of the product at issue. He was a bystander/player who was struck by a ball batted by the product." (App.69). The court agreed, ruling as a matter of law that **"Brandon was not the user of the bat."** (App.86)(emphasis added).

[4] The warning cases in Plaintiffs' brief are not bystander warning cases. (App.56). *La Paglia v. Sears Roebuck and Co.*, 531 N.Y.S.2d 623 (N.Y., Sp. Ct. 1988), involved failure to warn a consumer/user regarding a lawnmower. *McLaughlin v. Mine Safety Appliances Co.*, 181 N.E.2d 430 (N.Y. App. 1962), involved failure to warn an ultimate-user regarding a heating block. Neither court allowed a failure to warn a non-user bystander claim.

As explained by one court faced with a product failure to warn a bystander claim, "**there is no case law imposing such a duty**. Practical considerations underlie the dearth of support … [the] theory is unworkable …." *Cromer v. Sherwin-Williams Co.*, 2006 WL 1889252, *2 (D.S.C. 2006) (emphasis added). Another court granting summary judgment on a failure to warn claim involving a bystander (like Brandon), who "was standing at least 30-150 feet away from the [product] when the accident occurred," held:

> **[t]here was no feasible method by which [the manufacturer] could warn bystanders** such as Perez of the dangerous nature of its product (although, as explained above, if a product injures bystanders, those bystanders may have a claim for unreasonably dangerous design).

Perez v. Brown Manufacturing, 1999 WL 527734 (E.D. La. 1999)(emphasis added).

To be clear, as explained in *Perez*, defective design and manufacturing claims **can** be made by bystanders; H&B never argued otherwise. Those claims have nothing to do with warning anyone, but simply require the company to design and manufacture a product that, by virtue of being non-defective, will not be unreasonably dangerous. Of course, that is exactly what the jury concluded H&B did with its CB-13. (App.212).

Thus, bystanders have other protections, including defective design, manufacture and negligence claims. Here, Plaintiffs lost on their alternative

defective design and manufacturing claims against H&B, voluntarily dismissed their negligence claims, and chose not to pursue other claims, for example, against the City for negligent mound maintenance, or against the ball manufacturer for defective design, manufacture or failure to place a warning on the product Brandon actually used, and which actually inflicted his fatal injury.[5] In sum, the sole claim Plaintiffs prevailed on does not exist, and the court plainly erred by denying H&B's summary judgment motion.

Even if there could be such an illogical claim, the non-moving party would still need to produce evidence establishing a material issue that a warning could have been seen, and thus read and heeded by the bystander, non-user/consumer plaintiffs in a way to prevent the injury. *Riley*, 259 Mont. at 132-33, 856 P.2d at 198-99. Denial of summary judgment is reviewed under the same standard as granting it. *Schuff II*, ¶14. Here, Plaintiffs offered nothing, by affidavit, deposition-testimony or otherwise, to establish a material fact in dispute that

[5] This is not to say H&B believes baseballs are unreasonably dangerous products, anymore than it believes bats are – but, under Plaintiffs' theory, the ball could have carried a warning that if hit hard, a player might not have time to react and could be injured by being struck by it. Unlike a bat warning, a ball warning would at least be in the hands of the user, and be seen every time he pitched the product. Like bats, baseballs are designed to meet specifications. (App.170); s*ee also*: http://www.astm.org/Standards/F1888.htm. We will never know whether the ball that hit Brandon was defectively manufactured – *i.e.*, was harder (more compressed) than allowed – because the ball was not preserved. (App.106,197).

Brandon or his parents could have seen, read and heeded a warning on the CB-13 in a manner to prevent the accident. (App.55-56).

In denying H&B's motion, the court ignored the evidentiary failings, with no discussion of them at all. Moreover, the court apparently misunderstood the legal question, citing only defective design authority involving injured bystanders, but nothing about failure to warn claims. (App.67).

In sum, H&B was entitled to summary judgment as a matter of law on Plaintiffs' failure to warn a bystander claim. Accordingly, this Court should now, on *de novo* review, remand for entry of judgment in H&B's favor, the verdict to the contrary notwithstanding. *See, e.g.* , *Carelli v. Hall*, 279 Mont. 202, 926 P.2d 756 (1996); *Eatinger v. First Nat. Bank of Lewistown*, 199 Mont. 377, 649 P.2d 1253 (1982).[6] The Court need not reach any other issues. *Id*. at 383, 1256.

B. <u>H&B's Rule 50(b) Motion Was Wrongly Denied.</u>

Plaintiffs' bystander warning claim and causation evidence did not improve at trial. Plaintiffs realized this, and when faced with H&B's Rule 50(b) motion, in largest part made a procedural defense. Relying on inapplicable federal law, Plaintiffs argued in making its Rule 50(a) motions, H&B did not raise with enough

[6] Raising this bystander warning issue by summary judgment properly preserved it for appeal. Rule 4(4)(a), Mont. R. App. P.; *Ruana v. Grigonis*, 275 Mont. 441, 452, 913 P.2d 1247, 1254 (1996).

specificity Plaintiffs' failure to proffer evidence of failure to warn causation. (App.215-221). The court made short shrift of this, "concur[ring]with Louisville Slugger's construction and interpretation of the authority in support of its position on this matter." (App.235). While the court was plainly correct, it strayed into error on the elements of the claim and wrongly denied the motion on its substance.

1. There is No Evidence the Lack of a Warning Caused Brandon's Injury.

Plaintiffs have identified two pieces of evidence they say meet the *Riley* causation test: Duane Patch's testimony Brandon followed his curfew rules, and testimony that after Brandon died, the Miles City Mavericks used wood bats until they could no longer compete against the metal bat-using teams and switched back. (App.226-227,231-232). Neither goes to the issue of whether Brandon (or his parents) could have seen a warning on the CB-13, much less read and then heed it on July 25 in a manner to avoid Brandon's injury.

Whether Brandon followed rules set by his parents has nothing to do with the fact that he was 60-feet away from the Senators' CB-13 bat when Quinn used it. Moreover, Plaintiffs offered no evidence that Brandon's parents would, or could, have dragged their baseball-loving adult son off the field that day, or prohibited him from playing baseball, even if they somehow knew one bat (the CB-13) had a warning on it. This is crucial because Plaintiffs were not asking the jury to ban all metal bats or put warnings on all of them, their case – so they told

the jury and the court – was solely about the CB-13. (App.159,161,198). Thus, it must be a warning on the CB-13 only that is considered when assessing whether the absence of a warning on that particular bat could possibly have been the cause of Brandon's injury. Plainly, it could not – on the evidence in the record, a warning on the CB-13 would not have altered the outcome because Plaintiffs could not have seen it.

The same is true for the post-injury evidence of some use of wood bats – it can prove nothing about whether Brandon or his parents would have seen a warning on the CB-13, much less have somehow read and heeded it on July 25 to alter the sad outcome. In fact, the evidence that even Brandon's teammates now use metal bats (even "hotter" bats than the CB-13), actually shows how ineffective a mere written warning would have been because the tragic, real-world warning of Brandon's death was not warning enough to stop Legion players from using metal bats allowed by Legion rules, or for parents to forbid their sons to play. For good reason – the function of a baseball bat is to hit a baseball hard. Players know that, as do their coaches and parents.

Plaintiffs offered no evidence that the bat's user would have altered his conduct in the face of a warning; they did not even call Quinn as a witness. They also offered no evidence the consumer – Coach Thennis – would not have purchased the CB-13 in the face of a warning, much less that whatever other

certified metal bat he would have bought would not have hit the ball just as hard when Quinn used it, resulting in Brandon's death. Indeed, Plaintiffs conceded in closing "that every other aluminum bat on that day would have done the same." (App.198). Plainly, then, there is "a complete absence of any credible evidence in support of the [failure to warn] verdict," meaning H&B was, and is, entitled to judgment as a matter of law. *Schuff v. Jackson*, 2002 MT 215, ¶13.

2. The District Court Erred By Adopting a "Read-and-Heed" Inference.

The court knew the evidence was lacking under *Riley*, and did not dwell on that in denying H&B's Rule 50(b) motion. Instead, the court essentially "overruled" *Riley* by attempting to distinguish it:

> [H&B's *Riley*-based] argument fails to acknowledge the factual differences or the evidentiary conundrums inherent in a case in which the injured party dies as a direct result of his injuries. The Court has not been able to locate any Montana cases that are analogous to the case at bar with respect to the failure to warn involving a deceased plaintiff, and the parties have cited none. The precedential value of *Riley* falls short in such a distinguishable factual scenario.

(App.238). The court than held, in reliance on *Schutte v. Celotex Corp.*, 492 N.W.2d 773 (Mich. App. 1992), that "in this case the jury may properly have inferred from the evidence presented that a warning would have been heeded and the failure to warn caused the injury." (App.239).

Schutte is inapposite. It is a negligence case, not a products liability bystander-warning case. Moreover, regardless of whether it makes sense to infer a product user would read a warning, an inference for a non-user 60-feet away from another team's product is nonsensical. More importantly, this Court rejected even a user inference in *Riley*. There, the product user argued he had provided enough causation evidence to have his failure to warn claim submitted to the jury:

> [Plaintiff Riley] contends that his testimony relating to his respect for machinery and concern for safety **was sufficient evidence from which <u>to infer</u> that he would have ridden the motorcycle differently had a warning** … **been** given – creating an issue of fact for the jury on the causation issue.

Riley, 259 Mont. at 132, 856 P.2d at 198 (emphasis added).

In upholding a directed verdict against Riley, this Court rejected his request to allow causation in a products liability case to be proved by an unsupported inference. As the Court explained, "in developing a body of Montana products liability law, this Court consistently has required a plaintiff to establish a causal link between the lack of a warning and the accident and injuries in a failure to warn claim." *Riley* at 135.

As this Court held in *Sternhagen v. Dow*, 282 Mont. 168, 935 P.2d 1139 (1997):

> From the time we initially adopted strict products liability, we have reassured defendants that **strict liability is not absolute liability**. [Its] adoption … does not relieve the plaintiff from the burden of proving his

> case. **Vital to that is the necessity of proving** the existence of a defect in the product and **that such defect caused the injury complained of.**

Id. at 176, 1143 (emphasis added).

As this Court explained in *Riley*, shifting the causation burden by adopting an inference or presumption that a warning "would have [been] read and heeded" improperly puts the burden of proving lack of causation on a defendant already held to the strictest of liability standards, with few, if any, of the defenses available in defending a negligence claim. *Id.*, 259 Mont. at 135-36, 856 P.2d at 196.[7]

By its nature, products liability "failure to warn" already pushes the envelope on causation because it is based not on science but psychology, psychology this Court properly rejected in holding: "while … in an ideal world" it might be common sense to infer (or presume) that "if an adequate warning is given the plaintiff would have read and heeded it," we do not live in that mythical ideal world. *Id.* at 135. Instead, our "own experience does not support it; warnings are everywhere in the modern world and often go unread or, where read, ignored." *Id*.

In the seventeen years since *Riley* was decided, it has been relied upon several times by this Court as *stare decisis*, and has provided consistent law in this

[7] In *Riley*, this Court rejected both the "inference" and the "presumption" theories proffered by Plaintiff. 259 Mont. at 132. The dissent, which argued for adoption of a burden-shifting rule, also made no distinction between an "inference" rule and a "rebuttable presumption." 259 Mont. at 136.

State. In that time, the reasons for rejecting inferences or presumptions regarding the reading and following of warnings have only gotten stronger. As discussed by the latest court to reject this burden shift, allowing the inference/presumption that warnings have been read and heeded (which more often than not insulates manufacturers from liability rather than assisting injured consumers) is contrary to the public policy underlying adoption of products liability, namely pushing manufacturers to make safer products. *Rivera v. Phillip Morris, Inc.*, 209 P.3d 271, 277 (Nev. 2009).

As this Court noted in *Riley*, if adopted, the "read-and-heed" burden shift runs in both directions, "to the manufacturer/seller where a warning is given or to a plaintiff where it is not." 259 Mont. at 135. The "read-and-heed" burden shift, thus, "implies that a manufacturer can satisfy its duty of making [unsafe] products safe by [simply] providing adequate warnings." *Rivera*, 200 P.3d at 277.[8]

[8] A good example of this principle in action is *Gauthier v. AMF, Inc.*, 788 F.2d 634 (9th Cir. 1986). Applying Montana law pre-*Riley*, the Ninth circuit wrongly guessed this Court would adopt a "read-and-heed" presumption, and reversed a defective design verdict for a plaintiff who injured his hand in a snow blower that lacked a chute guard wire. Reversal was for refusal of the following instruction: "Where warning is given, the manufacturer may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous." *Id.* at 635. If this Court allows the district court's burden shifting inference to stand, this is the type of instruction manufacturers who slap a warning on an unsafe product will be entitled to in products liability cases going forward.

Agreeing with this Court's *Riley* opinion, the *Rivera* Court explained its own rejection of "both directions" of the "read-and-heed" burden shift:

> We find such a result [pushing manufacturers to depend on warnings] untenable. Instead, we strongly adhere to the principle that a manufacturer must make products that are not unreasonably dangerous, no matter what instructions are given in the warning. **Therefore, we conclude that it is better policy not to encourage reliance on warnings because this will help ensure that manufacturers continue to strive to make safe products. Further, as noted by the *Riley* court, it is not logical to presume that a plaintiff would have heeded an adequate warning , if provided.**

Rivera at 277 (emphasis added).

This Court recently reiterated that the Montana public policy underlying products liability is the same as the Nevada public policy relied on by the *Rivera* court: "Strict liability recognizes that the seller is in the best position to insure product safety. … [It] provides 'an incentive to design and produce fail-safe products which exceed reasonable standards of safety'." *Malcolm v. Evenflo*, 2009 MT 285, ¶ 32, *quoting Sternhagen*, 282 Mont. at 178. Because the "read-and-heed" burden-shifting inference adopted by the district court is contrary to this public policy, it cannot stand.

The sole rationale the court gave for adopting the inference that Brandon would have read **and** heeded a warning **and** that "the failure to warn caused the injury," is that meeting the *Riley* standard may be difficult in a death case. (App.238-239). *Rivera* is a death case, and that distinction did not sway the

Nevada court. 209 P.2d at 273. This Court also rejected the same argument in *Riley*, explaining concerns "that a plaintiff may die before the testimony is given are not unique to [a failure to warn] cause of action." 259 Mont. at 135. In fact, since the legally-relevant actors – the consumer and user – are **not** deceased, Plaintiffs here did not need a deceased plaintiff's inference even under the district court's erroneous theory. Instead, Plaintiffs had every opportunity to provide evidence that Coach Thennis or Quinn would have altered their conduct in the face of a warning but (by their own choice) never attempted to do so.

Moreover, on the facts of this case involving the allegation of failure to warn Brandon or his parents, **non-user bystanders**, an inference that they would have read a warning on another team's bat is not only counter to experience, it is physically impossible because they would not have seen a warning had one existed. They were too far away from the bat to read any warning on it. On the undisputed evidence before the jury, then, Montana statutory law flatly prohibits the inference the court applied post-trial:

> **When an inference arises**. An inference **must** be founded:
>
> (1) on a fact legally proved; and
>
> (2) on a deduction from that fact that is warranted by a consideration of the usual propensities or passions of people, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

Section 26-1-502, MCA (emphasis added).

What possible fact was "legally proved" that would warrant a deduction Plaintiffs would have seen (and thus at least been physically able to read) a warning on the Senators' bat in Quinn's hands? The only "fact" offered by the court to support the "read-and-heed" inference is that Brandon "die[d] as a direct result of his injuries." (App.238). That sad fact has nothing to do with logically deducing Brandon or his parents would have seen and read a warning on another team's bat.

Plaintiffs proffered and proved no fact, for example, that Brandon (or his parents) had seen the CB-13 before Quinn used it that day, or knew that was the bat in Quinn's hands, and thus would have at least been in a position to read (or recall) something printed on it and react in a manner to alter the outcome. In fact, the court had earlier held as a matter of law that "**there is nothing in the record to show that Brandon knew what bat was being used** … ." (App.86-87) (emphasis added). As such, the first half of the "read and head" inference is directly contrary to the undisputed evidence, the prior ruling of the court and §26-1-502, MCA, because that inference is not based "on a fact legally proved" from which a "reading" deduction consistent with "the course of nature" that small print on a baseball bat cannot be read at a distance of 60-feet, could possibly be "warranted." On this record, the Court cannot allow that inference to stand.

That there is a second half to the inference is also important. This Court has already held a presumption that warnings, even if read, will be heeded, is "not supported" by common experience: "warnings are everywhere in the modern world and often go unread **or, where read, ignored**." *Riley*, 259 Mont. at 135 (emphasis added). And on the evidence here, the jury could not deduce anything from the "propensities or passions" (§26-1-502(2), MCA) of either people in general, or Brandon in particular, regarding whether Brandon would have heeded or ignored a warning on the CB-13 that day. This is because Plaintiffs offered **no** evidence of what this warning should have said, thus giving the jury no facts on which to base a legally-proper deduction that the warning would have been heeded, if read.

Moreover, the name of the inference, "read-**and**-heed," shows that "heeding" is a second inference based on a first inference – "reading" – and **not** on a fact legally proved as required by §26-1-502, MCA. This Court applied this statute in *Kuiper v. Goodyear Tire & Rubber Co.*, 207 Mont. 37, 673 P.2d 1208 (1983), to reverse a products liability jury verdict, reiterating the long-established law in Montana that "**one inference cannot be drawn from any other inference or presumption**." *Id.* at 54; 1217, quoting *Monforton v. Northern Pac. Ry. Co.* (1960) (emphasis added).[9]

[9] *Monforton* cited §§93-1301-1 to 4, Rev. Code Mont. 1947, which are now codified as 26-1-501 and 502, MCA.

In sum, under *Riley* and §26-1-502, MCA, the court wrongly applied a "read-and-heed" inference as its reason for denying what it otherwise conceded was a properly raised and proved entitlement to Rule 50(b) relief. Indeed, Rule 50(b) exists for just such a case as this one. Because without the erroneous inference there is "a complete absence of any credible evidence" in the record that the lack of a warning caused Brandon's injury, H&B is entitled to judgment as a matter of law.

C. Alternatively, H&B is Entitled to a New Trial.

As shown above, the proper outcome here is judgment as a matter of law. However, if this Court were to disagree, then H&B, alternatively, is entitled to a new trial on several grounds.

1. H&B's Assumption of Risk Defense was Wrongly Dismissed.

Pre-trial, Plaintiffs asked the court to preclude H&B's §27-1-719(5) defense, to prohibit "the admission of any evidence regarding the training pitchers receive to assume defensive stances or otherwise protect themselves from batted balls." (App.71). The court granted Plaintiffs' motion and no evidence came in on this issue. (App.84-87). That *in limine* ruling was an incorrect conclusion of law given the court's earlier (erroneous) decision to let the bystander-warning claim survive.

As this Court has held, "the defense of assumption of the risk in strict products liability cases [is] approved … because such a defense is expressly

authorized by statute." *Madrid v. Fifth Judicial Dist.*, 2002 MT 291, ¶5. If, despite the statutory language limiting claims to "physical harm caused by the product to the ultimate **user or consumer**" – §27-1-719(2) – the statute is interpreted to allow warning claims when the court has ruled that the injured party "was **not** the user" of the product, (App.86), and it is undisputed he was not the consumer, then the legislatively-mandated defense of assumption of risk will have to be adapted.

Here, Brandon (a college-bound adult) was well aware of the sole defect at issue in a "failure to warn" claim, the fact that no bats carried a warning of precisely how hard they could hit (including the CB-13); he knew balls would be hit at him quicker than he could respond because he had been hit before. If H&B had been allowed to offer evidence regarding pitcher training, there would have been proof that Brandon knew a ball hit just right would strike his head if not properly defended against, and he pitched the ball to a batter holding a metal bat with full knowledge and acceptance of the defect and danger. Under §27-1-719(2), that is a proper "assumption of the risk" defense for a jury allowed to decide a bystander-warning claim.

2. <u>The Jury was Mis-Instructed.</u>

H&B requested its instruction No.20, which incorporated into the language of MPI2d 7.04, the elements of failure to warn causation adopted in *Riley*. The

court refused this instruction and gave, instead, court's No.15. (App.189). Court's No.15 was the sole failure to warn instruction, and it badly misstates Montana law.

a. There is no bystander contemplation test.

The first element of proof in MPI2d 7.04 and H&B No. 20 read identically, telling the jury what Plaintiffs must prove to prevail on failure to warn:

> First, that the Defendant manufactured or sold the product in a defective condition because of a **failure to** adequately **warn of those dangers which would not be readily recognized by the <u>ordinary user of the product</u>**.

(App.208,209)(emphasis added). This "ordinary user of the product" language has been oft-approved by this Court, most recently in *Malcolm*: "A product is defective if it is dangerous to an extent beyond that anticipated by the ordinary user." 2009 MT 285, ¶32, citing *McAlpine v. Rhone-Poulenc Ag. Co.*, 2000 MT 383, ¶25.

Court's No.15 substitutes "bystander" for the words "ordinary user of the product," thus changing significantly whose contemplation the manufacturer (and the jury) must consider when deciding whether a product needs a warning – ordinary users, for whose anticipated use the manufacturer has designed the product, or all others, who do not use the product, and may not even know what it is or does. Obviously, the latter is a much broader, amorphous standard that put H&B under a duty it likely could never meet, thereby plainly prejudicing it. Because this sole "failure to warn" instruction does not properly state the law in Montana, this paragraph alone requires reversal. *McAlpine*, ¶¶16, 23-26.

Plaintiffs objected to the stock "ordinary user of the product" language in H&B's No. 20, explaining: "it uses 'user' again rather than bystander, despite the note in the MPI that we should use 'bystander' in a bystander case." (App.189). This refers to MPI2d 7.00, the instruction that explains what a claim for strict products liability is in Montana. It defines who is injured (a user) and by what (a product), and has a note that reads: "In cases of injuries to bystanders, the court should modify the 'user' language accordingly." (App.207). In other words, this instruction allows "bystander" to be substituted as the party injured by a design or manufacturing defect, something – as discussed above – H&B has never disputed.

Nothing in MPI2d 7.00 suggests that "bystander" should be substituted in other instructions for "user." In fact, there are no notes about bystanders in any of the other MPI products liability instructions, specifically not in the instructions regarding who manufacturers must have in their contemplation when deciding how to design products and whether and how to include a warning. Both Plaintiffs and the court simply misunderstood the limited import of the "bystander" note in MPI2d 7.00.

The prejudicial error that resulted from this misunderstanding is explained well in a recent decision by the Wisconsin Supreme Court. *Horst v. Deere & Co.*, 769 N.W.2d 536 (WI 2009). Like Montana, Wisconsin allows strict liability claims "if the product is unreasonably dangerous based on the expectations of an

ordinary user or consumer," what Wisconsin calls the "consumer contemplation test." *Id.*,538. Plaintiff Horst appealed from a design defect verdict for the manufacturer of a lawnmower that he used to injure his bystander son. Horst argued the trial court erred by not substituting "bystander" in place of "user or consumer" in several instructions. The trial court inserted "bystander" only in the instruction defining what injured parties can sue, but left unchanged instructions defining defect as a product "dangerous beyond the reasonable contemplation by an ordinary user or consumer." *Id.*,539-40. Relying on the Restatement (Second) of Torts, and rejecting the dissent's suggestion that Wisconsin follow the Restatement (Third), the *Horst* court affirmed, firmly rejecting adoption of a "bystander contemplation" test like that imposed by the court here in its instruction No.15. *Id*.,550.

The *Horst* court explained that a "bystander contemplation" test is "inherently unworkable," would "[dis]incentivize manufacturers to research and implement safer designs," and "comes dangerously close to absolute liability by adopting an amorphous, ambiguous, and standard-less test that effectively gives a jury the power to find a manufacturer liable under almost any conceivable fact situation." *Id.*,550-51. That was certainly true here. The jury had no instruction regarding who H&B should have warned, and how, but was left rudderless to impose liability because H&B did not somehow issue a warning to non-consumer

bystander parents of a non-user adult. That is precisely the type of "absolute" products liability this Court has consistently rejected. *Sternhagen*, 282 Mont. at 176.

The *Horst* court also found it troubling that a "bystander contemplation" test would "change the focus from the product to the injured party … creat[ing] different levels of duty for strict products liability purposes [depending on who was injured], blurring the line between negligence and strict products liability." *Id.*,551-52. Like the Wisconsin Supreme Court, this Court quite recently rejected an opportunity "to inject negligence principles into strict liability law." *Malcolm*, ¶¶34-40. Accordingly, as so cogently shown in *Horst*, the district court here committed reversible error by rejecting H&B's "ordinary user of the product" language in its Instruction No.20, and instead giving court's No.15, which imposed an erroneous and prejudicial "bystander contemplation" test.

b. The court wrongly refused H&B's causation instructions.

Causation is the crucial element in a failure to warn claim. *Riley*, 259 Mont. at 132. It is simple, after-the-fact, to allege a product should have carried a warning, or a different warning than it did. Thus, the requirement to prove that the lack of a warning actually caused the injury is the bulwark against absolute liability. This was the key to H&B's defense against Plaintiffs' warning allegations, as argued by H&B's counsel in closing. (App.195-196).

Unfortunately, the court erroneously deprived H&B of a *Riley*-based causation instruction that would have put the legal meat on the factual bones of H&B's defense. (App.189,209).

In its instruction No.20, H&B added the language from *Riley* to the end of the second element sentence of MPI2d 7.04, which states that the plaintiff must prove "the failure to provide adequate warning caused injury." H&B's proposed final sentence reads: "Causation for a failure to warn claim requires proof that a warning would have altered the use of a product or prompted precautions to avoid the injury." (App.209). This is a fair adaptation of *Riley* to a bystander failure to warn case (assuming, *arguendo,* such a claim exists), which did not even limit who had to alter conduct or take precautions to ordinary users or consumers.

Plaintiffs objected that the *Wood/Riley* language "is not in the MPI," and the court refused No. 20, stating: "I think the stock instruction is clear." (App.189). In the Memorandum denying H&B's Rule 50(b) motion, the court explained further, suggesting no error by "the addition of language adapted from *Riley,*" but holding "the language of MPI2d. 7.04" alone "adequately instructed the jury on the causation issue without drawing undue emphasis to the causation element." (App.238-239). With all due respect, this explanation makes no sense. In fact, the

instructions as given do not define causation at all, either as a "substantial factor" or "but for" cause-in-fact.[10]

As for "undue emphasis," the fact that Plaintiffs failed to meet the *Riley* causation test was a crucial part of H&B's defense theory. "It is reversible error to refuse to instruct on an important part of a party's theory of the case. Furthermore, a party has a right to have jury instructions which are adaptable to his theory of the case." *Krueger v. General Motors*, 240 Mont. 266, 277, 783 P.2d 1340, 1347 (1989). H&B was entitled to instructions on *Riley* causation – emphasis was the point, not a problem. *Id*. Given the lack of any evidence in the record of causation, and the court's need to apply a *post-hoc* inference rule to deny H&B's Rule 50(b) motion, it is clear this lack of a jury instruction adaptable to H&B's main defense of no causation affected the "substantial rights" of H&B, requiring a new trial. *Lacock*, 277 Mont. at 20-21, 919 P.2d at 375.

[10] The court also refused H&B's No.26, which properly defined "caused" as the defect being "a substantial factor" in causing the harm, and that the jury should consider whether the bat only increased the harm that resulted from other causes. (App.190,210). Plaintiffs argued there was no evidence of other causes. H&B responded the ball struck Brandon and was the "cause[] in fact" of the injury, not the bat. (App.190). Evidence was also offered regarding the non-regulation mound height. (App.173). Thus, the proffered instruction was proper and should have been given. *See, e.g., Busta v. Columbus Hospital*, 276 Mont. 342, 371-72, 916 P.2d 122, 139-40 (1996).

3. There is Insufficient Evidence to Support the Verdict and Erroneous Rulings Denied H&B a Fair Trial.

As established in Section B.1 and 2, above, there is insufficient evidence of failure to warn causation in the record to justify the verdict, with or without a "read-and-heed" inference. If judgment as a matter of law is not ordered, then that same insufficiency entitles H&B to a new trial under §25-11-102(6), MCA. *D.R. Beat Alliance, L.L.C. v. Sierra Production Co.*, 2009 MT 319, ¶45.

As also shown above, the court applied a "read-and-heed" inference that is contrary to *Riley* and §26-1-502, MCA, which is an error of law excepted to by H&B that entitles it to a new trial under §25-11-102(7), MCA. Moreover, Plaintiffs never requested by pre-trial motion, jury instruction request, or in the Final Pretrial Order that *Riley* be reversed or distinguished, and that a "read-and-heed" inference be the rule of proof for causation governing the trial, despite the fact H&B relied on *Riley* in moving for summary judgment, in offering jury instructions and in framing the issues to be tried in the Final Pretrial Order. (App.25,209,95).

Evidence H&B would have offered had application of such an inference rule been properly raised before trial, includes concessions by Debbie Patch that Brandon continued to play football despite a doctor's warning, that she might not have been able to persuade him to abandon baseball even in the face of a bat warning, and evidence Brandon did not quit pitching or take precautions despite

receiving warnings through training he could be hit in the head and seriously injured. (App.11,12,73). The court's application of this inference rule, post-trial, changing the governing *Riley* standard when H&B could not offer evidence to rebut it, was "an irregularity in the proceedings" by order of the court that prevented H&B "from having a fair trial." A new trial is, thus, required under §25-11-102(1), MCA.

D. <u>New Trial Must Be Limited to Liability On Failure to Warn.</u>

As a final matter, if the Court remands for new trial, then Plaintiffs' decision not to cross-appeal from summary judgment on their manufacturing claim, the jury's verdict on their design claim, and the damages award, requires retrial to be limited to liability only on the failure to warn claim. Cross appeals are jurisdictional, and issues not cross-appealed from become final and cannot be subsequently challenged. *Joseph Eve & Co. v. Allen*, 284 Mont. 511, 514-15, 945 P.2d 897, 899 (1997). *See also McCormick v. Brevig*, 2007 MT 195, ¶¶37-39. Accordingly, the manufacturing defect summary judgment, the design verdict and the $850,000 damages award are all final in the event of remand for a new liability trial on failure to warn. *See, e.g. McCormick* at ¶¶37-39 (legal ruling of court is final on remand on different issue); *Hobbs v. Pacific Hide & Fur Depot*, 236 Mont. 503, 504, 771 P.2d 125, 126 (1989) (jury verdicts on separate claims are final on

remand of one claim); and *Engelsberger v. Lake County*, 2007 MT 211 (jury's damages award is final on remand for liability determination).

VII. CONCLUSION

The lack of an unspecified warning on the CB-13 bat did not cause Brandon's death. On this record there is no doubt the non-user/bystander Plaintiffs would not have seen a warning and could not have altered the outcome. Even if Coach Thennis would have purchased a different bat, or Quinn would have used another bat, Brandon still would have died that sad July day.

The evidence is uncontroverted: Coach Thennis would have bought, and Quinn would have used, another metal bat. Plaintiffs conceded in closing "every other aluminum bat on that day would have done the same," and Brandon would still have died, even if the CB-13 had a warning. Plaintiffs' proper claim was that the CB-13 was defectively designed. Once that claim was lost on the science, all that remained was sympathy. Having done its job on the proper claim, with proper instructions, the jury was left with an amorphous claim that never should have survived legal challenge, under faulty instructions that gave it no proper guidance what to do. Not surprisingly, unrestrained by law, the jury went with sympathy in response to a family tragedy. It was the court, not the jury, that did not do its job. Now this Court must fix the error and preserve "America's Game."

Baseball is a simple sport. Players throw, hit and catch a ball. Two products are required – a bat and a ball. Neither are complex. No warning can tell players how to use them differently to make them any safer. Balls are thrown hard, bats are swung hard, and when the two collide, balls travel fast. That is the very essence of the game. The jury's sympathy verdict complicates this fundamental simplicity and, taken to its extreme, could bring the amateur game to its knees. The verdict does not say what to warn, leaving manufacturers adrift. "Caution, this bat hits balls faster than infielders may have time to react to" -- is that a warning or a sales pitch?

And how do you get any warning to those who might need it; non-users who cannot read small print on a bat 60-feet or more away, and have no way to alter the user's conduct? This verdict gives no guidance. If vague warnings of facts and risks that users and consumers already know are put on bats, what comes next? Must league sponsors read product warnings over public-announcement systems? What would that change if the grim warning of Brandon's death has left players still using metal bats? When another accident happens – and it will, because risk is a product of the game, not of the game's products – the city, group or college that sponsors the league or owns the field will be sued. Insurance will skyrocket or dry up, and the recreational baseball Brandon so loved, will disappear.

A never-specified warning on the CB-13 bat would not have saved Brandon. A wood bat rule would not have saved him either, as the jury concluded in its verdict on the science that the CB-13 was not defective, but a bat like all others properly certified for play. That is the only truth supported by the record. Accordingly, H&B asks this Court to grant it judgment as a matter of law, or to remand for a new liability-only trial on failure to warn.

Respectfully submitted this 16th day of July, 2010.

HOLLAND & HART LLP

By _____
W. Scott Mitchell
Robert L. Sterup
Kyle Anne Gray

Attorneys for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

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Dated this 16th day of July, 2010.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the following:

Curt Drake
Michael A. Kauffman
Drake Law Firm, P.C.
111 North Last Chance Gulch
Suite 3J, Arcade Building
P.O. Box 1181
Helena, MT 59624-1181

Joe E. White, Jr.
White & Weddle, P.C.
5532 North Western
Oklahoma City, OK 73118

Kelley A. George
James A. Scimeca
Burch & George, P.C.
204 North Robinson, Suite 1500
Oklahoma City, OK 73102

Dated this 16th day of July, 2010.

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